

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

<b>IN THE MATTER OF:</b>	:	<b>CASE NUMBER</b>
	:	
CLIFTONDALE OAKS, LLC,	:	04-95161-WHD
	:	
Debtor.	:	
_____	:	
	:	
CLIFTONDALE OAKS, LLC,	:	
	:	
Movant,	:	
	:	
v.	:	
	:	
JAMES W. SPENCER,	:	
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
Respondent.	:	BANKRUPTCY CODE

**ORDER**

Before the Court is the objection to the claim of James W. Spencer, filed by Cliftondale Oaks, LLC (hereinafter the “Debtor”). This matter is a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(B); § 1334.

**BACKGROUND**

The Debtor is a limited liability company, comprised of Empire Strategic Investments, LLC (hereinafter “Empire”) and Ecufund, LLC. Empire has two members, Horizon Joint Venture Group, LLC (hereinafter “Horizon”), and Mary Tran. James Spencer is the principal individual member of Horizon and is also the managing director of

Evergreen Strategic Investments of Florida, LLC, which is the managing director of Horizon. At all times relevant to this matter, Harry Burton was the managing director of Ecufund, which was the managing member of the Debtor.

The Debtor owned undeveloped land in Fulton County (hereinafter the "Property"), which the Debtor intended to develop into a residential subdivision. The Debtor filed a voluntary petition under Chapter 11 of the Code on July 2, 2004. In order to complete the development of the Property, the Debtor needed to obtain post-petition financing. To this end, Spencer sought a loan from Altra Investments for \$1.425 million. In order to move forward with the process, Spencer paid a \$20,000 fee to Altra. Spencer discussed his efforts to obtain the loan with the Debtor's bankruptcy counsel, but did not obtain authorization from Ecufund to proceed with these efforts prior to paying the \$20,000 fee. Spencer also sought a \$175,000 loan from Highland Financial Group, for which he paid a \$1,500 fee. Again, Spencer did not do so with Ecufund's permission.

However, it appears that the Debtor may have been seeking financing from Altra on its own behalf. In any event, the Debtor filed two motions for approval of post-petition financing, the first of which sought approval of a \$170,000 loan from Highland Financial Group and the second of which sought approval of a \$1.6 million loan to be made by Industry Investments, LLC. The Debtor's secured lender and the United States Trustee objected to the loan, and the Court denied its approval.

Ultimately, the debtor sold the Property to John Wieland Homes and proposed a

Chapter 11 plan that has paid all creditors in full. Spencer now seeks payment as an administrative expense of the loan application fees, as well as two other minor amounts for administrative costs incurred during the Debtor's case. The Debtor does not oppose the payment of the two minor amounts, but does object to reimbursement for the loan application fees.

### CONCLUSIONS OF LAW

The Debtor has objected to Spencer's proof of claim and asserts that the claim is not allowable as an administrative expense against the estate. Pursuant to section 503(b), the Court shall allow the payment of an administrative expense, including a claim for "the actual, necessary expenses of preserving the estate." 11 U.S.C. § 503(b). The burden of establishing entitlement to an administrative expense claim is on the claimant. *See In re BCE West, LP*, 319 F.3d 1166 (9th Cir. 2003). "In general, post-petition business expenses are granted administrative-expense priority so that third parties will risk providing the goods and services that are necessary for a struggling debtor to reorganize." *In re Kadjevich*, 220 F.3d 1016 (9th Cir. 2000). However, an "actual and necessary cost must have been of benefit to the estate and its creditors." *In re H.L.S. Energy*, 151 F.3d 434 (5th Cir. 1998); *see also In re N.P. Mining Co., Inc.*, 963 F.2d 1449 (11th Cir. 1992). Generally, the expense must have arisen from a post-petition transaction between the claimant and the trustee or the debtor-in-possession. *See In re Smoot*, 2006 WL 848120 (Bankr. E.D. Va. 2006)

(disallowing claim for litigating cause of action, which was an estate asset, without involvement or consent of the trustee).

In this case, it does not appear that the payment of the loan fee was authorized by the Debtor. Accordingly, the Court cannot conclude that Spencer's claim for reimbursement for the fee arose from a transaction between the Debtor and Spencer. Additionally, it does not appear that the payment of the loan fees produced any benefit to the Debtor, as the loan was never approved or obtained. The Court cannot find that Spencer's claim for reimbursement is entitled to administrative expense priority.

A debtor-in-possession may incur unsecured debt in the ordinary course of business. *See* 11 U.S.C. § 364(a). Claims arising from such extensions of credit are automatically entitled to administrative expense priority under section 503(b)(1). *See id.* However, the debtor may only incur unsecured debt outside the ordinary course of business with prior court approval. *See id.* § 364(b). If such approval is obtained, the claim arising from the extension of credit is entitled to administrative expense priority under section 503(b)(1). *See id.*

In this case, Spencer, an insider of the Debtor, essentially paid funds to third parties to secure financing for the Debtor. It appears that Spencer did not intend the payment of the \$20,000 or the \$1,500 in fees to be a contribution to capital, but rather a loan to the Debtor, which Spencer expected would be repaid. Setting aside the issue of whether the Debtor authorized or encouraged Spencer to loan money to the Debtor to pay these fees, the

substance of the payment of the fee could be characterized as the extension of unsecured credit by Spencer to the Debtor. However, even if the payment of the fees is so characterized, the Court could not conclude that these debts were incurred in the ordinary course of the Debtor's business. These amounts were necessarily incurred outside of the ordinary course of the Debtor's business and, as such, required the Debtor to obtain court approval prior to the extension of credit. Without such approval, the claim arising from any "loan" that may have been extended by Spencer to the Debtor is not entitled to administrative expense priority.

#### **CONCLUSION**

For the reasons stated above, the Debtor's objection to the claim of James W. Spencer, is **DENIED** in part and **SUSTAINED** in part. James W. Spencer is entitled to payment of his claim for \$469 for copies and \$75 for renewing the Debtor's business license. The remainder of the claim is **DENIED**.

#### **IT IS SO ORDERED.**

At Atlanta, Georgia, this \_\_\_\_\_ day of June, 2006.

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W. HOMER DRAKE, JR.  
UNITED STATES BANKRUPTCY JUDGE